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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

KAVEH KAMYAB,

Defendant and Appellant.

B187608

(Los Angeles County
Super. Ct. No. LA042908)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Martin L. Herscovitz, Judge. Affirmed.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Thomas C. Hsieh, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Kaveh Kamyab was convicted, following a jury trial, of one count of conspiracy to commit kidnapping in violation of Penal Code¹ section 182, subdivision (a)(1), three counts of kidnapping for ransom in violation of section 209, subdivision (a), and one count of robbery in violation of section 211.² The trial court sentenced appellant to the six year mid-term on the count 6 robbery conviction plus a life sentence on the count 4 kidnapping for ransom conviction. The court ordered sentence to run concurrently on the counts 2 and 3 kidnapping for ransom convictions and stayed sentence on the conspiracy to commit kidnapping conviction.

Appellant appeals from the judgment of conviction, contending that the trial court erred in refusing to modify the jury instruction on duress, admitting appellant's first statement to police, denying his motion for a new trial and failing to stay sentence on the robbery conviction. We affirm the judgment of conviction.

Facts

On April 17, 2003, Jean Antoun live with his wife Sylvia and his 11-year-old daughter, Seriah, in Woodland Hills. He heard a knock on his door and asked "Who is it?" The reply was "LAPD, open up." Jean complied. Two African-American men wearing police uniforms and carrying guns were outside. They told Jean that they wanted to come inside and talk about a car theft ring. When Jean asked for identification, the men pushed him to the ground, held a gun to his head and handcuffed him. The men also handcuffed Sylvia and made her sit on the floor with Seriah. The men put Jean on the couch and blindfolded him.

Soon, a third man arrived who spoke English with a Spanish accent. The first two men called him "Captain." The "Captain" told Jean that someone had paid him \$150,000

¹ All further statutory references are to the Penal Code unless otherwise specified.

² Appellant was found not guilty of one count of kidnapping for carjacking in violation of section 209.5, subdivision (a).

to kill Jean. The Captain put sunglasses with the lenses covered with duct tape on Sylvia and Seriah.

The men ransacked the house. Jean believed that a total of five men were involved in the ransacking. Seriah saw only two African-American men and one Hispanic or Middle-Eastern man. Sylvia heard the voices of two men plus the "Captain." She also believed that the Captain was Hispanic or Middle-Eastern. The men found and took credit cards. They asked Sylvia and Seriah where the safe was. Both replied that there was no safe in the house.

The Captain then said to Jean: "Where is the safe? They told us you have cash money in the safe. We want the money." He told one of the men to put a gun to Jean's head and shoot him. Jean told the men that he did not have a safe or money at the house. He stated that if he could go to Felix Chevrolet, he could get \$200,000 in cash with no questions asked. Jean was the general manager of the dealership. The men argued among themselves, then agreed. They put a jacket on Jean and told him it was full of explosives. They also put a microphone on the vest and led Jean to believe that they had a receiver and would be able to hear everything that he said.

The men took Sylvia and Seriah to Sylvia's car, a white Mercedes, and put them in the car's backseat. Three men got into the car as well. After five to eight minutes of driving, the car stopped and the three men got out. Three men got back into the car. One of them was the Captain, who had not been in the car before. They then drove some more and arrived at a building. Sylvia and Seriah were taken to a bathroom and left alone.

The Captain and another man drove Jean to a mall in his Cadillac. The Captain asked Jean for his cell phone number and said that he would call Jean at 10:00 a.m. on either the cell phone or the dealership phone. He told Jean that if he made any wrong moves, they could hear him and would blow him up. He then told Jean to keep his eyes closed for three minutes. Jean complied. During this time, he heard two doors open and close.

Jean drove to Felix Chevrolet. On the way there, he called Darryl Holter, the vice-president of the dealership, and Asad Farah, who worked with the president and told them to come to his office because he needed some cash to buy used cars. When Jean arrived at his office, he wrote down what had happened to him that morning, as well as a plan of action.

When Holter arrived at Jean's office, Jean gave him the note. The note suggested that Holter call someone "higher up" at the LAPD and proposed a plan whereby Jean would issue checks for \$200,000, then try to cash them. The bank would call the dealership's owner and Jean would be "arrested" for attempted embezzlement. This would give Jean an excuse for not having the money. Farah entered the office, and Jean told him to talk to Holter. Jean asked Holter: "Can you do it?" Holter replied: "Yes." Jean wrote a second note explaining that he was bugged and being watched and that any wrong move would endanger his family.

Jean walked outside and saw the LAPD. His cell phone rang. It was the Captain. Jean asked where he should drop off the money. The Captain said he would call back in half an hour with the location. A SWAT team told Jean to put down the cell phone. He complied. Officers approached him, took off the jacket and handcuffed him. The jacket had no explosive in it. Before Jean was taken home, he was interviewed by a series of police officers. During the interviews, police brought up appellant's name. Jean had been involved in litigation with appellant in 2000 on behalf of Felix Chevrolet. Jean had not seen appellant during the crimes.

Meanwhile, a man brought Sylvia and Seriah something to eat. Later a second man brought them Coca-Cola. A few hours later, the Captain arrived, handcuffed Sylvia and Seriah together, then handcuffed Seriah to a metal coil. He left a sleeping bag and towel. Hours later Sylvia heard banging and explosions. Sometime the following day LAPD detectives arrived, freed the women, and took them to the police station.

The police had located the women using a global tracking system on Sylvia's Mercedes. At about 1:00 p.m. on April 17, LAPD learned the location of the Mercedes and sent a surveillance team to the location. Detective Doug Varner watched the

Mercedes and saw Roberto Sandoval walk up to the Mercedes and retrieve a black bag from the front passenger side. Detective James Martin followed Sandoval and saw him get into a green Mercedes SUV. At about 2:45 p.m., the LAPD followed the green Mercedes to a storage facility on San Fernando Road.

Detective Martin walked past the green Mercedes and saw appellant in the driver's seat, a white male in the passenger seat and Sandoval in the back seat. Detective Martin saw Sandoval and the white male open the doors of a storage unit. Appellant took a bag from the green Mercedes and put it in a white truck later determined to belong to Torvald "Tex" Gubins. It was later learned that Gubins had rented the storage unit. Sandoval and the white male returned from the storage facility and together with appellant got into the green Mercedes and drove away.

Police secured the storage facility. Sylvia and Seriah were inside, in a bathroom.

LAPD detectives followed the green Mercedes to Victorio's Pizza restaurant in North Hollywood. Appellant and Sandoval went inside the restaurant. Appellant stayed inside for about 45 minutes. Then, at about 5:40 p.m., he left, got back inside the green Mercedes and drove away. Appellant drove to the Hollywood Bowl, then a strip mall, another spot and a gas station. He then went to the Alexander Hotel and entered it. Police arrested appellant at the hotel at about 10:00 p.m. They found directions to the storage unit in appellant's briefcase.

Detectives Brett Richards and Jack Giroud interviewed appellant on April 17, at 11:55 p.m. During the interview, appellant denied involvement in the crimes. He did not mention any threats to himself or his family.

On April 19, Detectives Richards and Giroud again interviewed appellant, at appellant's request. In this interview, appellant stated that about a year earlier he had become involved with some Nigerians in a counterfeiting scheme that involved duplicating real bills. Appellant introduced the Nigerians to Sandoval, who appellant believed was part of the "Greek Italian mafia." Sandoval provided \$40,000 in cash. The Nigerian who was supposed to duplicate the money instead absconded with it.

When appellant told Sandoval what had happened, Sandoval pulled out a gun and told appellant to drive to the location where the duplication was supposed to occur. Once Sandoval verified that the money was gone, he told appellant to drive to his house. Sandoval made it clear that he expected appellant to repay the money. Appellant drove Sandoval to a condominium in Calabasas where his ex-wife and children lived. Appellant convinced Sandoval not to come inside because it was very late.

The two men then drove to Sandoval's restaurant. There, Sandoval told appellant that he had borrowed half of the \$40,000 from "Peter," a member of a mafia group, and that he would "whack" everybody if the money was not repaid by the following Tuesday. Appellant gave Sandoval the names of two people to rob and suggested repossessing a limousine that appellant was holding as collateral. The limousine was repossessed but could not be sold due to title difficulties. Nothing came of the names provided by appellant.

Peter gave Sandoval and appellant another week to come up with the money. Appellant came up with Jean Antoun's name. Sandoval instructed appellant to find out Jean's home address. Appellant did so, by following him with the assistance of "Tex," one of Sandoval's "guys." Sandoval then told appellant that they were going to "take" Jean and demand money. His plan involved posing as police officers and putting a bomb on Jean.

On the day of the robbery, appellant went to a clinic. Sandoval called him all morning. Tex called him and told him to buy a six-pack of soda and bring it to Tex's storage facility. Appellant went straight to the storage area because he did not have any money. Sandoval was there and told appellant the victims were in the storage facility.

Appellant and Sandoval went to a liquor store and bought sodas. Sandoval called Jean from a pay phone.

Appellant spoke to Jean on the phone. Appellant then drove Sandoval around in a green Mercedes. While they were driving, someone called Sandoval and told him that Jean had called the police and the bomb squad had shown up.

Sandoval and appellant picked Tex up in shopping center. Appellant dropped Sandoval off near a white Mercedes, and Sandoval retrieved some items, including guns, from the car. The three men then drove to the storage facility. Appellant stayed in the car while the other two men checked on the victims. Appellant drove Tex to Valley Circle and Mulholland and Sandoval to his restaurant.

Sandoval told appellant that he was going to "whack" Jean but not his wife and child. Appellant asked Sandoval to let Jean's wife and child go free. Sandoval said that they had to find another person right away or Peter would "whack" them.

Sandoval gave appellant \$30. He went to buy drugs and gas, then went to a Starbucks and to a Japanese restaurant. Appellant then returned to his hotel room and called Sandoval and asked him to let Jean's wife and child go. At about 10:00 p.m., appellant was arrested.

After appellant was arrested, he did not call his ex-wife or his attorney because he could not remember their telephone numbers. He repeatedly called Sandoval's restaurant, but no one answered.

Appellant identified Sandoval from a six-pack photographic line-up. On April 21, he identified Tex from a six-pack photographic line-up.

At trial, appellant testified that his wife divorced him in 2000 and later married his civil attorney. In 2002, appellant developed a heroin addiction. He received treatment that same year and did not use heroin until the day the Nigerian took the cash.

Appellant repeated his story of the Nigerian counterfeiting scheme and the theft of Sandoval's money. He added that "Tex" Gubins was present when the Nigerian absconded.

He testified that when Sandoval told him to drive to his house after the theft, he believed that Sandoval wanted to know his family's location so that he would not disappear. Appellant did not actually live in the condo. His ex-wife lived there with appellant's children and her new husband. Appellant was afraid for his family. Sandoval made it clear that he considered appellant responsible for the loss of the money. Appellant believed that Sandoval was a mobster.

Sandoval made appellant see him every day after the theft. Gubins followed appellant to a downtown hotel. Sandoval made appellant move to the Alexander Hotel, which was closer to Sandoval's restaurant. Sandoval made appellant bring his children to the restaurant on weekends and threatened at least 20 times that he would "get at" appellant and his family if appellant did not find a way to repay Sandoval. Sandoval said that he would kill appellant's family. Appellant did not call the police because he was afraid. His main concern was his children and his ex-wife.

Appellant was watched by men working for Sandoval. One of them appeared while appellant was at a restaurant with his children. Appellant ran into Gubins at a mall. Sandoval took appellant to his daughter's school and wrote down the license plate number of his ex-wife's car.

Appellant gave Sandoval the names of two possible robbery victims and suggested repossessing the limousine. When these plans did not work out, appellant gave Sandoval Jean Antoun's name. Acting on Sandoval's order, appellant followed Jean to his home. Sandoval told appellant that he and two men would take money and jewelry from Jean's house and then put a bomb on Jean and send him to a bank.

Appellant's testimony about the day of the robbery was substantially similar to the account he gave to police.

Appellant testified that he believed that if he did not follow Sandoval's directions, Sandoval would kill him, his ex-wife and his children. Appellant believed that Sandoval could carry out his threat immediately because he always carried a gun.

Appellant did not tell his ex-wife or her new husband that she and the children were in danger.

Appellant did not tell the truth during his first interview with police because he did not know whether police had arrested Sandoval and Gubins. He was afraid of Sandoval. By the time of the second interview, appellant had seen a newspaper describing him as the mastermind and was afraid that he was going to spend a lot of time in prison for something he did not do.

Discussion

1. Duress

Appellant contends that the trial court erred in refusing his request to modify CALJIC No. 4.40 to instruct the jury that the defense of duress also applied when threats of harm are made to third parties, in this case his ex-wife and children. We agree that the trial court incorrectly believed that the defense of duress applied only to threats to harm a defendant. We see no harm to appellant from this error, because there was no evidence to support the requested modification to the duress instruction.

Section 26 describes the duress defense: "All persons are capable of committing crimes except those belonging to the following classes: [¶] ... [¶] Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused."

The duress defense applies to both threats to a defendant's life and to threats to a third party. (*People v. Coffman* (2004) 34 Cal.4th 1, 100; *People v. Heath* (1989) 207 Cal.App.3d 892, 897-899.)

"[T]he defense of duress negates the intent or capacity to commit the crime charged. Defendant needs to raise only a reasonable doubt that he acted in the exercise of his free will. [Citation.] In order to show that his act was not the exercise of his free will, defendant must show that he acted under an immediate threat or menace. [Citation.] Because of the immediacy requirement, a person committing a crime under duress has only the choice of imminent death or executing the requested crime. The person being threatened has no time to formulate what is a reasonable and viable course of conduct nor to formulate criminal intent. The unlawful acts of the person under duress are attributed to the coercing party who supplies the requisite mens rea and is liable for the crime. [Citation.]" [Citation.] Decisions upholding the duress defense have uniformly involved "a present and active aggressor threatening immediate danger." [Citations.] A 'phantasmagoria of future harm' such as a threat of death to be carried out at some

undefined time, will not diminish criminal culpability. [Citations.]" (*People v. Petznick* (2003) 114 Cal.App.4th 663, 676-677.)

Appellant contends that he believed that Sandoval would kill his ex-wife and children if he did not help Sandoval, and that it is reasonable to infer that he believed that Sandoval had someone watching or near his family who could carry out an order from Sandoval immediately. Perhaps so. The threats to appellant's family and appellant's involvement in the crimes began several *weeks* before the crimes took place, however. He had ample time to formulate a reasonable and viable course of conduct. Appellant was not with Sandoval during the entire time between the threats and the crimes. If nothing else, he could easily have used the telephone to warn his ex-wife or her new husband or to call the police. Thus, appellant was not faced with the choice of the imminent death of his family or executing the requested crime. (See *Sam v. Commonwealth* (Va. App. 1991) 411 S.E.2d 832, 840 [13 Va.App. 312, 326-327] [duress defense was not available to defendant because after the threatening co-defendant drove off in the kidnapping victim's car, the defendant had a reasonable opportunity to stop participating in the crimes, and to call the police or to warn his family before the co-defendant would be able to carry out his threat].)

2. Appellant's statement to police

Appellant's counsel moved to suppress statements he made on April 17, the night of his arrest, on the ground that appellant had invoked his right to counsel. Appellant's counsel specified that the invocation occurred at page 78 of the transcript of the interview. Appellant now contends that his trial counsel was ineffective in failing to point out an invocation of counsel earlier in the interview, at page 44 of the transcript. He further contends that the trial court also erred in failing to review the entire transcript of the interview and discover this earlier invocation itself. He concludes that the trial court erred in denying his motion to suppress.

The scope of appellate review of constitutional claims of this nature is well established. The appellate court must accept the trial court's resolution of disputed facts

and inferences, and its evaluations of credibility, if they are supported by substantial evidence. The court makes an independent determination from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained. (*People v. Crittenden* (1994) 9 Cal.4th 83, 128.) Since we make an independent determination of this issue, we need not and do not reach the issues of whether appellant received ineffective assistance of counsel or the trial court erred in failing to review the entire transcript of the interview.

Before beginning a custodial interrogation, police must inform a suspect of his right to remain silent, have an attorney present and have an attorney appointed for him if he cannot afford one, and the suspect must knowingly and voluntarily waive those rights. (*Miranda v. Arizona* (1966) 384 U.S. 436, 449.) If a suspect invokes his rights at any time during the interrogation, the questioning must cease. (*Miranda v. Arizona, supra*, 384 U.S. at pp. 444-445, 473-474.) Questioning may resume if the request for counsel is granted or if the suspect restarts the interview. (*Edwards v. Arizona* (1981) 451 U.S. 477, 44, 45.)

"In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect 'must *unambiguously*' assert his right to silence or counsel. (*Davis v. United States* (1994) 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (*Davis*), italics added.) It is not enough for a reasonable police officer to understand that the suspect might be invoking his rights. (*Ibid.*) Faced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda*, . . . either to ask clarifying questions or to cease questioning altogether. (*Davis, supra*, 512 U.S. at pp. 459-462, 114 S.Ct. 2350.)" (*People v. Stitely* (2005) 35 Cal.4th 514, 535.)

Here, at the beginning of the interview, appellant was advised of his constitutional rights, including his right to remain silent, have an attorney present before and during any questioning and have an attorney appointed for him without charge. Detective Giroud then asked appellant if he wanted to talk to them. Appellant replied: "Well, I, I took, you

ask questions, I answer sir. . . .And if it gets to a point that I think I need my, contact my attorney . . . then I tell you then."

At page 44 of the transcript, Detective Richards asked appellant whether the missing woman was involved "in this extortion plot, or whatever you're doing here?" Appellant replied: "I'm not doing anything. No, no, I think it's time I called my attorney. I'm not doing anything, sir. I'm not doing anything."

Then at page 78 of the transcript, Detective Giroud said: "Okay. And until we can prove different, you're gonna be in jail for kidnap." Appellant said: "Can I call my lawyer?" The detective replied: "You certainly can, sir." Appellant responded: "Okay." Detective BR then asked another question about the crime, appellant replied and the interview continued.

Appellant's first statement, "I think it's time I called my attorney," is similar to a number of statements which have been found ambiguous and equivocal. (See *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 52 ["I just thinkin', maybe I shouldn't say anything without a lawyer" not a clear and unambiguous request for counsel]; *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1070-1072 [defendant's statement that "I think I would like to talk to a lawyer" not an unequivocal request for counsel]; *Burket v. Angelone* (4th Cir. 2000) 208 F.3d 172, 196-198 ["I think I need a lawyer" found equivocal]; *Diaz v. Senkowski* (2d Cir. 1996) 76 F.3d 61, 63-65 ["Do you think I need a lawyer" found equivocal].)

Here, appellant continued to speak, unprompted, after making his statement about calling his attorney. He said: "I'm not doing anything, sir. I'm not doing anything." This is an indication that he was not actually asserting his right to counsel. (See *People v. Stitely, supra*, 35 Cal.4th at p. 536.) Detective Richards responded to appellant's denial, saying "You've done something." Appellant not only continued to protest his innocence, he offered to provide more information, stating: "And if you bring any of these people that you mentioned, and they say that I did it, in front of you or me, you got a case. I haven't done anything. This, may I say who these people are to you?" In context, appellant's reference to calling an attorney is reasonably understood as part of his

protestation of innocence and not an unequivocal statement that he wanted an attorney present.

Appellant's second reference to counsel was a question: "Can I call my lawyer?" This Court has previously found ambiguous a defendant's question: "[C]an I call my lawyer or my mother to talk to you?" (*People v. Roquemore* (2005) 131 Cal.App.4th 11, 24-25.) As we pointed out in *Roquemore*, a number of courts have found questions about a lawyer to be ambiguous. (See e.g., *Soffar v. Cockrell* (5th Cir.2002) 300 F.3d 588, 593-596 [defendant's questions on "whether he should get an attorney; how he could get one; and how long it would take to have an attorney appointed" were equivocal]; *Dormire v. Wilkinson* (8th Cir.2001) 249 F.3d 801, 803-804 [the defendant's request "'Could I call my lawyer?'" found equivocal]; *Diaz v. Senkowski* (2nd Cir.1996) 76 F.3d 61, 63-65 ["'Do you think I need a lawyer?' " held to be equivocal]; *Lord v. Duckworth* (7th Cir.1994) 29 F.3d 1216, 1219-1221 ["'I can't afford a lawyer but is there anyway I can get one?'"].)

Here, appellant's question was asked in response to the detective's assertion that he was going to jail. A reasonable understanding of appellant's question is that he wanted to make sure that he could call a lawyer if he was going to jail at that moment. When the detectives did not march him out of the room, he took the opportunity to continue speaking in the apparent hope that he could convince them that he was not involved in the crimes. (See *People v. Gonzalez* (2005) 34 Cal.4th 1111["[I]f for anything you guys are going to charge me I want to talk to a public defender too, for any little thing" found to be equivocal and ambiguous].)

3. New trial motion

Appellant contends that the trial court erred in denying his motion made on the ground of newly discovered evidence. We do not agree.

In ruling on a motion for new trial based on newly discovered evidence, the trial court considers whether: (1) the evidence, and not merely its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) the evidence is such as to render a different result probable on a retrial; (4) the party could not with reasonable

diligence have discovered and produced it at trial; and (5) these facts are shown by the best evidence of which the case admits. (*People v. Beeler* (1995) 9 Cal.4th 953, 1004.) A trial court may evaluate the credibility of the proposed testimony in its determination of whether the introduction of the evidence in a new trial would render a different result reasonably probable. (*People v. Delgado* (1993) 5 Cal.4th 312, 329.)

"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. [Citations.]" (*People v. Delgado, supra*, 5 Cal.4th at p. 328.)

Appellant's "newly discovered" evidence was the testimony of a co-defendant, Willie Bruce, who had been a fugitive during appellant's trial. Bruce would have testified that he witnessed continuous threats and threatening conduct toward appellant and his family aimed at getting appellant to cooperate in the charged crimes.

Appellant contends that the trial court improperly based its finding that Bruce was not credible on the court's observation of Bruce in two other trials, and that this reliance violated his federal constitutional rights to confrontation and due process. We agree that the trial court's finding concerning Bruce's credibility does appear to have been based in part on the court's experience in the other trials. However, the trial court gave at least equal weight to at least one other ground for denying the motion, and that ground provides a solid basis for denying the motion. The trial court detailed Bruce's criminal record, which stretched back to 1982 and, then emphasized: "And then, perhaps most importantly, in Los Angeles County, a commitment to state prison for two years for two counts of perjury. This man is a convicted perjurer." Thus, we see no reasonable possibility that the trial court would have granted the motion in the absence of its experience with Bruce in two other trials.

We also note that appellant did not mention Bruce in his police interviews or during his own trial testimony. Yet in support of his motion for a new trial, appellant filed an affidavit stating that he was forced to take Sandoval, Gubins and Bruce to his ex-wife's residence and children's school and that Bruce was with him on "virtually" a daily

basis for a month and a half before the crimes including an occasion when Sandoval pointed a gun at appellant to demand his cooperation. Appellant's failure to mention Bruce at his trial would render both his own testimony about Bruce's involvement and Bruce's testimony incredible at any subsequent trial. (*See People v. Dyer* (1988) 45 Cal.3d 36, 51 [noting discrepancy between testimony of "newly discovered" witnesses and defendant's own trial testimony].)

A finding that a "newly discovered" witness is not credible is an implicit finding that the witness's proposed testimony would not render a different result reasonably proper on retrial. Thus, the trial court did not abuse its discretion in denying appellant's motion for a new trial.

4. Section 654

The trial court imposed consecutive sentence for the count 4 kidnapping for ransom conviction and the count 6 home invasion robbery conviction. Appellant contends that the trial court erred in failing to stay sentence on the robbery conviction pursuant to section 654 because the kidnapping and robbery both had the same objective and same victim. We do not agree.

Section 654, subdivision (a) prohibits punishment for two offenses arising from the same act or where an indivisible course of conduct violates more than one statute.³ Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

³

Section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Even though a defendant entertains a single primary objective during an indivisible course of conduct, he may be punished separately for each crime of violence committed against a different victim. (*People v. Centers* (1999) 73 Cal.App.4th 84, 99.)

The named victim of the kidnapping was Seriah. The named victim on the robbery was Jean. Thus, the victims were not the same. Further, as appellant acknowledges, these crimes were ones of violence. Robbery is a violent crime listed in section 667.5, subdivision (c)(9.), Kidnapping for ransom falls within the definition of a violent crime in section 667.5, subdivision (c)(7). Thus, even if Seriah was also an (unnamed) victim of the robbery as well as Jean, the multiple victim exception applies.

Discussion

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

I concur:

KRIEGLER, J.

MOSK, J., Concurring

I concur.

I have some concerns regarding the issue of duress.¹ The trial court, by giving a duress instruction, must have believed that the evidence warranted such an instruction. In California, the defendant need “only [] raise a reasonable doubt that he had acted in the exercise of his free will.” (*People v. Graham* (1976) 57 Cal.App.3d 238, 240; see *People v. Petznick* (2003) 114 Cal.App.4th 663, 676.) The burden is on the prosecutor to establish that the crime was not committed under duress. It is for the trier of fact to make the determination. (*People v. Perez* (1973) 9 Cal.3d 651, 659; *People v. Graham, supra*, 57 Cal.App.3d at p. 240.) The trial court erred by limiting its instruction to threats against defendants’ life and omitting threats to a third party. (See *People v. Coffman* (2004) 34 Cal.4th 1, 100; *People v. Heath* (1989) 207 Cal.App.3d 892, 897-899; *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 25, disapproved on other grounds in *People v. Garziano* (1991) 230 Cal.App.3d 241, 243, and *People v. Heath, supra*, 207 Cal.App.3d at pp. 897-899.)

The defendant contended that he acted upon the belief that others would kill his ex-wife and children if he did not carry out the crime and that the threats included statements that the threats could be carried out immediately. He argues that it does not matter that *he* may have had time to formulate another course of conduct if his former wife and children were under constant and immediate danger of being killed.

More recent California law authorities have stated, ““Because of the immediacy requirement, a person committing a crime under duress has only the choice of imminent death or executing the requested crime. The person being threatened has no time to formulate what is a reasonable and viable course of conduct nor to formulate criminal intent. The unlawful acts of the person under duress are attributed to the coercing party

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I use the term duress to include necessity. The two terms are different, but not for purposes of this case. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901-902.)

who supplies the requisite mens rea and is liable for the crime. [Citation.]’ [Citation.] Decisions upholding the duress defense have uniformly involved “‘a present and active aggressor threatening immediate danger.’” [Citation.]” (*People v. Petznick, supra*, 114 Cal.App.4th at p. 676; but see *People v. Anderson* (1968) 264 Cal.App.2d 271, 274-275, cited with approval in *People v. LoCicero* (1969) 71 Cal.2d 1186, 1191, fn. 5; *People v. Perez, supra*, 9 Cal.3d at pp. 658-659.) There is no clear holding that this formulation applies to a threat against a third person.

One authority with a different view of the immediacy requirement has written, “[t]o say that a threat of future harm is not sufficient is to ignore the fact that the nature of a threat is to hold out a future harm. All danger to the ‘duressed’ is in the future . . . when one seeks to avoid it, such avoidance implies a temporality not coterminous with the harm threatened.” (Newman & Weitzer, *Duress, Free Will and the Criminal Law* (1957) 30 So. Cal.L.Rev. 313, 328.) Another authority has written, “Perhaps it is these concerns that have led many courts to construe the imminence requirement more liberally, holding that imminence is to be determined by the trier of fact based on an assessment of all the circumstances.” (Robinson, *Criminal Law Defenses* (1984) *Duress*, § 177(e), p. 359; see *People v. Petrovich* (Ill. App. 1979) 396 N.E.2d 629.)

Defendant contended that there was “‘a present and active aggressor threatening immediate danger.’” (*People v. Petznick, supra*, 114 Cal.App.4th at p. 676.) But the People contend that defendant had the time to formulate criminal intent and a reasonable and viable course of conduct. As noted, that provision regarding duration has been applied to the person threatened and not third persons, although, it could mean a threat to the defendant concerning third persons. Whether a person has a reasonable and viable course of conduct is often discussed under the imminence requirement. Here, the two concepts could be separated. The defendant had time to formulate criminal intent and a reasonable and viable course of conduct, but the purported threat remained imminent.

The California statute on duress does not provide for threats against third persons or imminence or lack of time to formulate criminal intent. (Pen. Code, § 26; see *People*

v. Pena, supra, 149 Cal.App.3d Supp. at p. 25.) Those refinements have been added by judicial opinions. The law of duress in California remains somewhat undeveloped.²

There is a dilemma if a loved one is threatened, as is alleged here. But public policy is served by not allowing a defense of duress when a defendant has the opportunity to warn potential victims and call law enforcement, but fails to do so and participates in a crime putting others at severe risk of harm. For that reason, I concur in the judgment.

I note that it has been said, “[p]erhaps the main reason that defendants have had so little luck establishing coercion, compulsion, or duress as a defense to kidnapping charges is that by its nature the crime takes place over extended period of time, making it difficult for defendants to show that they faced continuous danger without opportunity for evasion. The courts have frequently pointed to interludes during the kidnappings when the allegedly coerced defendant could have escaped from the threatened danger, or safely alerted the authorities. Another factor, not peculiar to kidnapping, but repeatedly noted by the courts as tending to defeat claims of coercion, compulsion, or duress by kidnapping defendants has been that the defendant did not immediately raise a claim of duress on being apprehended, but waited until some later stage of the proceedings. In general, the most common basis for the courts’ refusal to sustain claims of coercion, compulsion, or duress as a defense in kidnapping prosecutions has been that, under the circumstances presented, the defendants’ contentions were simply not believable.” (Annot., Coercion, Compulsion, Or Duress As Defense To Charge Of Kidnapping (1989) 69 A.L.R.4th 1005, 1009, fns. omitted.)

MOSK, J.

²

It was said almost 25 years ago, “California law regarding the ‘justification’ defenses (i.e., ‘duress,’ ‘necessity,’ ‘compulsion,’ etc. . . .) appears sparse in comparison to that of most American jurisdictions (*People v. Pena, supra*, 149 Cal.App.3d Supp. at p. 21.)